IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 118.

HAMILTON S. WALLACE, *Appellant*,

v.

THE UNITED STATES, *Appellee*.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR APPELLANT.

In answer to the brief of the United States in the above entitled cause appellant begs to submit the following reply brief.

The first point set up by the United States is that—

> "SECTION 1230, REVISED STATUTES, DOES NOT APPLY TO THE CLAIMANT'S DISMISSAL."

The argument of the Government in support of said point is to the effect that—

"a. The section does not apply to an officer dismissed by the action of the President in appointing, with the approval of the Senate, his successor."

"b. The President, with the approval of the Senate, appointed an officer to supersede the claimant."

Answering the first contention of the Government, appellant contends—

That while, as stated in the opening paragraph of the Government's argument it has been recognized that the power of removal of federal officers is incident to the power of appointing them, and that the President can, with the consent of the Senate, remove officers whom the Constitution authorizes him to appoint with the consent of that body, it must appear in such a case that the Senate concurred in the removal and it has never been held that the President, with the consent of the Senate, can *dismiss* an officer of the Army by superseding him in the manner stated.

There is a wide distinction, which is well recognized in military law, between a mere removal of an officer and the dismissal of an officer. When an officer resigns, is entirely retired, or dropped from the rolls, he is "discharged" and there are three kinds of discharges known to military law, namely, "honorable discharges," "discharges without honor" and "dishonorable discharges." (Digest of Opinions of Judge Advocate General, 116-117.)

The "dismissal" of an officer, on the other hand, implies punishment, and such action should be taken in those cases only in which an officer is charged with an offense on which it would be proper to try him by general court martial.

In military usage the words "dismissal" and "discharge" have entirely separate and distinct meanings. A

person may be honorably discharged but cannot be honorably dismissed, for the word dismissal implies a dishonorable separation from the service. (Source-Book of Military Law and Wartime Legislation, pp. 731-4, 751-4, 763-7. Also 2 Ops. J. A. G., 889-90.)

An examination of the Articles of War will demonstrate beyond the shadow of a doubt that the dismissal of an officer of the Army is a penalty for an offense. In this country we do not punish people without trials and without offering the accused an opportunity to show his innocence. In the case at bar appellant was dismissed out of hand by the President, without having been informed even of the nature of the charges against him, and within three weeks thereafter the President appointed an officer to be Colonel with the intention, so it is alleged, of superseding appellant, and if the confirmation by the Senate of the unjust punishment was secured it was accomplished without the knowledge by the Senate that any one was being punished or even who was being superseded, because the nomination of the officer who is alleged to have superseded appellant did not in any way mention the appellant or make any reference by which he could be identified as the officer who was being succeeded.

In the Government's brief the fact is ignored that the appellant was not merely superseded or removed but was *dismissed*, though the appellant had urged the point, not only in the court below, but in his initial brief. The Government's brief would seem to contend that "removal" is synonomous with "dismissal." In support of its contention it declares that in four cases it has been held by this Court that the act of the President in appointing, with the consent of the Senate, a new officer in place of one already in the service *dismisses* the latter from the posi-

tion which he held. Not a single one of the four cases, however, is in point.

In the McElrath case (cited in the brief) the claimant, an officer in the Marine Corps, was dismissed for desertion, in time of war, by the Secretary of the Navy. The claimant had attempted to resign and acquiesced in his dismissal for more than six years. He never did apply for a court martial upon the charges on which he was dismissed. He made application to the Department for the revocation and annulment of the order of dismissal, six years after said order was issued, and the President issued an order restoring him to the rolls. He sued for his salary from the date of dismissal to the date of restoration, and the United States denied any indebtedness and asserted a counter claim for the money paid him since his restoration by the President.

The Court held that he had been removed by the nomination by the President of George B. Haycock to be first lieutenant *vice* Thomas L. McElrath dismissed; that:

> "The nomination and confirmation subsequently of Lieutenant Haycock, followed by his commission as First Lieutenant in the Marine Corps in place of Lieutenant McElrath, as certainly operated under the law as it then was to remove the latter from the service as if he had been dismissed by direct order of the President under his own signature. This, because, as is conceded, the President, at the time he asked the advice and consent of the Senate to the nomination of Lieut. Haycock in place of Lieut. McElrath, had the power to dismiss the latter, summarily, from the service. That power, if not possessed in time of war by the President, in virtue of his constitutional relations to the Army and Navy, and as to that question we express no opinion, was given by an Act of Congress approved July 17, 1862."

It would therefore seem that the Supreme Court decided that the President had power to dismiss McElrath, but aside from that he had been removed by the nomination and confirmation of his successor in office.

In the case of Blake v. U. S., 103 U. S., *227*, the facts were that the President received and accepted what purported to be a resignation of Blake and nominated "Alexander Gilmore of New Jersey, *vice* Blake resigned." Subsequently, it was determined by the War Department that Blake was insane when he submitted his resignation and he was restored to his office. He sued for his salary from the time of the acceptance of his resignation until the date of his restoration and the Court held that the

> "appointment of Gilmore with the advice and consent of the Senate, to the office held by Blake, operated in law to supersede the latter, who, thereby, in virtue of the new appointment, ceased to be an officer in the Army from and after, at least the date at which that appointment took effect, and this without reference to Blake's mental capacity to understand what was a resignation."

In the case of Keyes v. U. S., 109 U. S., 336, the facts were that Keyes was dismissed by sentence of General Court Martial which was approved by the President. Therefore the case in no way refers to the power of the President to summarily dismiss an officer. Four months after the dismissal of Keyes the President nominated Goldman to the Senate for appointment as 2nd Lieut. in said Regiment *in the place of Keyes dismissed.* The Senate confirmed the appointment and then Keyes sued for his salary from the time of his dismissal on the ground that the Court Martial had no jurisdiction to try him because one of its members, Colonel Merritt, was prosecutor and witness and also one of the judges who ren-

dered the verdict and sentence. The Supreme Court held that Keyes, having acquiesced in the proceedings, the judgment could not be attacked collaterally in the manner attempted. The Court cites with approval the case of Blake v. U. S. upon the point—

> "That the President has the power to supersede or remove an officer of the Army by the appointment of another in his place, by and with the advice and consent of the Senate, and that such power was not withdrawn by the provisions in Section 5 of the Act of July 13, 1866, c. 176, (14 St. at Large 92), now embodied in Section 1229 R. S."
>
> In the case of Mullan v. U. S., 140 U. S., 240, the facts were that Mullan was dismissed by sentence of court martial, approved by the President. Six months thereafter the President nominated "Lieut. Commander Francis M Green to be Commander in the Navy from the 7th of July, 1883, *vice* Commanders T. H. Eastman, retired, and Horace E. Mullan, dismissed."

The Senate confirmed the nomination and subsequently Mullan sued for his salary, contending that the court martial was an illegal tribunal, because of the seven members participating in the trial five were his juniors in rank. The Court held that under the law—

> "The sentence of the court martial and its approval by the President cannot be regarded as void."

but the Court goes on to state that aside from the legal character of the court martial, under the doctrine enunciated in the Blake and Keyes cases, the nomination of Green by and with the advice and consent of the Senate, and his commission in place of Mullan,

> "put Mullan out of the Navy, even if the proceedings of the court martial had been void."

This case has no bearing upon the President's right of dismissal.

In each of these four cases it will be noted that one officer was nominated vice another officer, whose name was given and the Senate was informed that he had "resigned" or been "dismissed" as the case might be. In confirming the nomination, the Senate, in each case, concurred in the removal of the officer who was superseded.

In the case at bar, the most that can be contended by the Government is that the President *intended* that the office held by the appellant was to be filled by Smith, who was named as Colonel on the day immediately following the order of dismissal of appellant, and it is contended in the Government's brief that—

> "This result is not affected by the fact that the Senate, when it approved the appointment of Lieut. Col. Smith as Colonel in the Quartermaster Corps, was not informed that this officer was nominated to replace the claimant. Since under the Constitution the President alone has the power to make nominations, he alone has the power to determine their nature and character. When the Senate approves a nominee for appointment made by the President, the resulting appointment has the nature and character of the President's original nomination and is not affected by the Senate's knowledge or lack of knowledge of its nature or character." (P. 7-8.)

Such a contention is absurd.

In the case at bar we can only infer the President's intention that Smith was to supersede the appellant, by the face that appellant had been dismissed the day before the date on which Smith's appointment was to be effective and that the complement of officers was full, unless this dismissal created a vacancy, but are we to assume that

the President deliberately intended to prevent appellant from having any opportunity whatever to apply for a court martial under Section 1230 R. S. and, if so, did he not attempt to nullify the Act of Congress?

Such seems to be the logical conclusion from the brief of the Government, but we have every confidence that this Court will not stamp such a proceeding with its approval.

The second point urged in the brief for the United States is that "THE CLAIMANT WAIVED HIS RIGHTS UNDER SECTION 1230 BY HIS DELAY IN APPLYING FOR TRIAL." The brief concedes the fact that the dismissed officer is entitled under the Act to some time within which to apply for a Court Martial. The Solicitor General states that "Since delay beyond a period of two or three weeks could be of no advantage to the claimant and since a greater delay was such as would, and in fact, did, prejudice the Government, the claimant must be held to have so far acquiesced in his dismissal that he cannot now invoke in his behalf the provisions of Section 1230."

Why two or three weeks? Because in less than three weeks after the issuance of the order dismissing the claimant from the service, the President nominated Smith (who it is alleged superseded him,) and in less than four weeks after the issuance of the order of dismissal the nomination of Smith had been confirmed; and, therefore, the Solicitor General could not concede to this appellant four weeks within which to apply for trial without admitting that the appellant had not had reasonable time within which to exercise his right to apply for Court Martial.

Section 1230 does not limit the time within which a dismissed officer may be entitled to apply for the Court

Martial provided for. There is no regulation of the War Department which prescribes any limit. The order dismissing the appellant did not notify him of any time within which he should exercise his right to apply for Court Martial. The only adjudicated case in which the question has been referred to by any court of the United States is the case of *Newton vs. United States, 18 Court of Claims, 435.* It was there held that "an officer irregularly or wrongfully dropped from the rolls should demand his restoration or make application for Court Martial within a reasonable time * * * In this case the claimant waited nine years before making his application. During all this time he did not report himself to the Department, neither rendered nor offered to render any service, made no claim to the office for pay, and now gives no good reason for his long silence. Under these circumstances, in our opinion, the law should presume acquiescence." And see 15 Opp. Atty. Gen., 569.

The original statute (Section 12 of Act of March 3, 1865, 13 slats. p. 439) applies to both the Army and the Navy. In the revision of 1878, the statute as applied to the Army was enacted as Section 1230, Revised Statutes, and as applied to the Navy it was enacted as Article 37 of Section 1624, Revised Statutes. Said Article 37 clearly contemplates that an application for a Court Martial by a dismissed officer of the Navy may be made at any time. Its language is: "When any officer, dismissed by order of the President since March 3, 1865, makes, in writing, an application for trial, setting forth, under oath, that he has been wrongfully dismissed," etc. Considering the fact that said provision when enacted stretched back from 1878 to 1865, and contains no limitations as to future cases, and that it is otherwise identical with Section 1230 Revised Statutes; considering also that there is

no apparent reason why Congress should have granted an officer in the Navy the right to apply for Court Martial after he had been dismissed any time subsequent to March 3, 1865, but an officer dismissed from the Army should not have at least thirty days within which to apply; it would seem clear that the construction sought to be placed upon Section 1230, Revised Statutes, by the Solicitor General in his brief is hardly warranted. There is no difference between Section 1230, Revised Statutes, and Article 37 of Section 1624, Revised Statutes, except that one statute applies to the Army and the other applies to the Navy. In one section the intention is clearly expressed, and the other section expresses no contrary intention, and we submit that Congress did not evince a disposition to restrict the right of an officer dismissed from the Army to apply for a Court Martial therein provided within three weeks, nor intend that an officer should be deprived of his rights if his application for a Court Martial is filed within a reasonable time. Of course, what is reasonable is to be judged from the circumstances in each case. The statute allows the President six months from the time of the filing of the application within which to convene a Court Martial, if one is to be ordered under the statute. There would seem to be no reason why the claimant should not have at least the same length of time in which to apply for a Court Martial. Moreover, in the case at bar the records show that the claimant was not even informed of the charges upon which he was dismissed and to apply for a Court Martial immediately, as suggested by the Solicitor General, practically meant that he had to be ready without time for preparation, to defend his entire record before a foe in ambush, because the Government at the proposed trial could select any charge whatever upon which to try him. He had not been informed as to the charge on which he had been dis-

missed. Under such circumstances, it would seem that the claimant should have a reasonable time within which to attempt to ascertain upon what charges he would be tried if he asked for a Court Martial. However, the claimant applied for a Court Martial before the expiration of six months from the date of his dismissal and he has shown a satisfactory reason for his failure to apply for a Court Martial at an earlier date. In finding of fact No. 5 of the Court of Claims, it is found that prior to June 14, 1918, the appellant had been advised that he could seek relief through Congress, and until that date he had no actual knowledge of his rights under Section 1230, Revised Statutes; that on the date that he learned of said statute he made application for trial by Court Martial which was an informal application and on July 16th he made a valid application under the Act. The last application was made less than six months after his dismissal. Certainly the claimant moved with the utmost speed, and it is significant that in the Court below the Government raised no objection to the claimant's application for Court Martial under Section 1230 on the ground that it was not seasonably made.

The third point urged in the brief for the United States is that "SECTION 1230 DOES NOT GIVE AN OFFICER DISMISSED BY THE PRESIDENT ANY RIGHT TO PAY AFTER HIS DISMISSAL," and the argument proceeds upon the theory that the application for a Court Martial under Section 1230 by a dismissed officer, nullifies the dismissal and therefore the said statute is inconsistent with Article 118 of the Act of August 29, 1916.

The action of the President dismissing the officer is not nullified under Section 1230, Revised Statutes, unless the President shall refuse to grant the Court Martial ap-

plied for, or the Court Martial convened in pursuance to the statute shall fail to award a sentence of death or dismissal; then, in either one of these events, the statute provides that the order of dismissal by the President shall be void.

There is no inconsistency whatever between Section 1230, Revised Statutes, and Article 118 or Act of August 29, 1916, but if there was, then said inconsistency existed from the time of the enactment of Section 1230, because the language of said Section 118 in so far as it relates to this matter is identical in terms with the language of Article 99 of Section 1342 enacted at the same time as Section 1230. As the language of Section 99 of Section 1342, Revised Statutes, did not render nugatory the provisions of Section 1230 enacted at the same time, the same language re-enacted at a later date could have no greater or different affect than in the original statute. Moreover, the Act of August 29, 1916, purports to amend only Section 1342 of the Revised Statutes (See Section 3) and the amendment of Section 99 of Section 1342 (in so far as it relates to this matter) consists in changing the number of said Article from 99 to 118.

Defendant's brief states that Congress intended by enacting Section 1230, Revised Statutes, to restore an officer to his former office if the order dismissing him was revoked, but that inasmuch as this Court has held that a dismissed officer has the same status as one who has never been in the military service and that he can regain his position only in the manner provided for appointment to office, it therefore follows that Section 1230 was ineffective.

The fallacy of the argument lies in the fact that this Court has never held that "a dismissed officer has the same status as one who has never been in the military

service." It has held that where an officer has been entirely separated from the service he cannot be restored to his office except by a new appointment and confirmation, which is correct. The effect of Section 1230, Revised Statutes, is to limit the scope of a summary dismissal by the President and under said Section an order of dismissal by the President does not *ipso facto* separate an officer from the service. None of the cases referred to in the defendant's brief are in point; not one of them has any bearing whatever upon the effect of a dismissal by the President in view of Section 1230, Revised Statutes. Our contention is that Congress was within its power in enacting Section 1230, Revised Statutes, that said statute cannot be fairly construed without holding that the order of the President dismissing the appellant is void by virtue of said statute, and if the appellant's dismissal was void, he has never been lawfully removed from his office and it follows that he is entitled to the salary of his office. We have cited numerous decisions which are harmonious on that point on Page 46 of our initial brief.

Respectfully submitted,

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